

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Issue date: 22Jul2002

BALCA Case No. 2002-INA-41  
ETA Case No. P1998-CA-09415001/JS

In the Matter of:

ARCHITECTURAL AREA LIGHTING,  
Employer

on behalf of:

DAVID TOPETE,  
Alien

Appearance: Leonard W. Stitz, Esquire  
David W. Williams, Esquire  
Santa Ana, CA

Certifying Officer: Martin Rios  
San Francisco, CA

Before: Holmes, Vittone, and Wood  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of David Topete ("Alien") filed by Architectural Area Lighting ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Office ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the

employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

### **Statement of the Case**

On November 22, 1996, the Employer, Architectural Area Lighting, filed an application for labor certification to enable the Alien, David Topete, to fill the position of Sheet Metal Worker (AF 15). The job duties for the position, as stated on the application, are as follows:

Lay out, fabricate, assemble and repair sheet metal parts of metal, steel, copper and aluminum to fabricate architectural area lightings such as custom/period style fixtures and poles, contemporary site lighting, bollards, wall brackets, luminaires and lanterns. Mark and lay out the dimensions of the piece to be processed based on the blue prints and specification, using rulers, scribes and divider. Set up and operate shears, process and forming rolls to cut, bend and give shape to material. Use hand tools/power tools such as grinders, buffs, and files to finish end product. Join component parts to assemble product using spot welders. Set assemblies in framework using lifting and handling tools, according to specifications.

(AF 15). The primary stated job requirement for the position is two years of experience in the job offered (AF 15, Item 14). In addition, the Employer required a resume or letter of qualifications (AF 15, Item 15).

In a Notice of Findings ("NOF") issued on April 10, 2001, the CO proposed to deny certification on the grounds that the Employer had rejected U.S. workers for other than lawful, job-related reasons (AF 12-14). The Employer submitted its rebuttal on or about May 10, 2001 (AF 5-11). The CO found the rebuttal unpersuasive regarding one of the three U.S. applicants cited in the NOF, and issued a Final Determination, dated May 24, 2001, denying certification on the above grounds (AF 3-4). On or about June 26, 2001, the Employer appealed the Final Determination (AF 1-2). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Employer filed a Statement of Position, which was received on January 3, 2002.

## Discussion

Under 20 C.F.R. §656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful job-related reasons. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the report of recruitment results, dated July 8, 1998, the Employer stated that it had evaluated five U.S. applicants. One of the U.S. applicants (Michael Esparza) "did not provide any means which would allow the employer to establish initial contact." The other four U.S. applicants (Mario Alfaro, Basilio Hinojosa, John Naumowicz, and Julio Galvez) were all reportedly contacted via certified mail and instructed to complete an employment application, but none of the foregoing returned a completed application for employment. Furthermore, the Employer asserted that Mr. Alfaro did not meet the minimum stated requirement, and that his resume should never even have been forwarded (AF 18-19).

In the NOF, the CO found that the Employer had rejected three U.S. applicants for other than lawful, job-related reasons; namely, Basilio Hinojosa, John Naumowicz, and Julio Galvez (AF 13-14). In the Final Determination, however, the CO denied certification solely based upon the Employer's rejection of Basilio Hinojosa for other than lawful, job-related reasons (AF 3-4). Accordingly, our focus herein is on the rejection of U.S. applicant Mr. Hinojosa.

In the NOF, the CO stated, in pertinent part:

### Basilio Hinojosa

In the case of this applicant, the employer shows only a mailing receipt and no return receipt. Also the application is not shown. In this instance the employer should have made additional attempts to contact the applicant before determining if he was available. This applicant is also considered qualified based on review of his resume.

Corrective action:

Submit rebuttal which documents how each U.S. worker named above has been

rejected solely for lawful, job-related reasons.

Note that the standard for documentation is established in Gencorp 87-INA-659.

Note that negative result of untimely attempt to contact and recruit will not be considered a cure.

(AF 13-14).

The Employer's rebuttal consists of an explanatory letter, dated May 10, 2001, co-signed by its attorney, Leonard W. Stitz, and its Executive Vice President & General Manager, Larry Randazzo, which states, in pertinent part:

Basilio Hinjosa: This applicant never returned the application nor did he call the employer to set up an interview appointment. The applicants (sic) experience is in aircraft interiors, he does not have prior experience in architectural area lighting. This applicant is considered unqualified, unavailable and not interested in the position.

(AF 5-6).

In the Final Determination, the CO found the Employer's rebuttal unpersuasive based upon its failure to provide adequate documentation. The CO stated, in pertinent part:

...By Notice of Findings...the employer was advised that it had not documented that U.S. applicants, including Basilio Hinjosa, were not available. The employer provided a certified mailing receipt to show that he had written to Mr. Hinjosa, but there was no return receipt to show if or when Mr. Hinjosa received the employer's letter. Additionally the employer had not shown the content of the letter sent to Mr. Hinjosa and other applicants. However, the employer has not provided any return receipt to show if or when Mr. Hinjosa received the employer's correspondence. It remains that there was no record showing if the applicant received the employer's letter, the employer should have made additional attempts to contact the applicant. The rebuttal does not indicate that any additional attempt to contact Mr. Hinjosa was made. Based on review of the information on file, the employer has not documented sufficient attempt to contact and recruit this applicant. Therefore, it follows that the employer has not documented that Mr. Hinjosa was rejected solely for job-related reasons.

Based on the above, the application for labor certification is denied.

(AF 4). We agree.

It is well settled that although a written assertion constitutes documentation, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Gencorp, 1987-INA-659 (Jan. 13, 1988)(en banc); A.V. Restaurant, 1988-INA-330 (Nov. 22, 1988); Carl Joecks, Inc., 1990-INA-406 (Jan. 16, 1992).

In its report of recruitment results, the Employer specifically stated that Mr. Hinojosa “*was contacted via mail.*” (Emphasis added). Furthermore, the Employer purported to enclose “the Receipt for Certified Mail as proof of mailing *and the Domestic Return Receipt showing the applicant received the invitation.*” (Emphasis added).(AF-18).

Despite the CO's finding that the return receipt had not been provided and specific instructions in the NOF to provide the return receipt (AF 13), the Employer failed to submit the requested documentation. Our review of the Appeal File confirms that, although a letter may have been mailed to Mr. Hinojosa (AF 36-37), there is no documentation that it was received by him. In contrast, the record contains documentation, which clearly shows that other U.S. applicants, such as John Naumowicz and Julio C. Galvez, received the letters sent by Employer (AF 29-30). Alternate means of contact may be required if one attempt is unsuccessful. M.N. Auto Electric Corp. 2000-INA-168 (August 8, 2001)(en banc).

In the Employer's Statement of Position, it alleges that Mr. Hinojosa “did not even bother to pick up his mail,” and thereby demonstrated a “lack of interest or a lack of responsibility.” On this new basis, the Employer asserts that its rejection of Mr. Hinojosa was lawful. However, as stated above, the Employer's contention on appeal flatly contradicts its prior statements. Furthermore, the Employer provided no documentation to show that the applicant refused receipt of Employer's letter.

In summary, the CO reasonably requested documentation of the Employer's recruitment efforts, specifically regarding U.S. applicant Hinojosa. The Employer failed to provide such documentation, and, instead, presented directly contradictory statements regarding whether or not Mr. Hinojosa ever received the correspondence. Furthermore, it is well settled that an employer is obligated to try alternative means of contacting seemingly qualified U.S. applicants.

Finally, the Employer asserts that, in any event, Mr. Hinojosa is not qualified, because his sheet metal working experience was in aircraft interiors, not architectural lighting. We note, however, that Mr. Hinojosa's resume reveals that he had approximately 23 years of experience as a Class A Sheet Metal Mechanic of which only 12 years involved aircraft interiors (AF 35). The Board has long held that seemingly qualified applicants' credentials must be investigated (*e.g.*, by interview) to determine whether the applicant meets all of the requirements. Gorchev & Gorchev Graphic Design, 1989-INA-118 (Nov. 29, 1990)(en banc). In the present case, the Employer's failure to make a good faith effort to contact Mr. Hinojosa precluded such an investigation. Accordingly, we find that labor certification was properly denied.

**ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

**A**

JOHN C. HOLMES  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.